# No. 20,585

IN THE

# United States Court of Appeals

## For the Ninth Circuit

ANITA T. OWENS,
*Appellant,*

vs.

RAYMOND WHITE, JOHN C. McCARTER, ALFRED POPMA, and ST. LUKE'S HOSPITAL, a corporation,
*Appellees.*

Appeal from Summary Judgment of Dismissal
of the United States District Court
for the District of Idaho,
Southern District
Honorable Ray McNichols, Judge

## APPELLANT'S OPENING BRIEF

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### STATEMENT OF JURISDICTION

This action was commenced on October 11, 1963. Motions, premised upon the allegation that the statute of limitations set forth in Section 5-219, Idaho Code, had run were filed on the 26th day of November, 1963 and the 3rd day of December, 1963. Thereafter, on the 20th day of December, 1963, the District Court entered its order granting the motion to dismiss without leave to amend. On January 17, 1964, Appellant filed her

notice of appeal to the United States Court of Appeals for the Ninth Circuit. Briefs and oral argument were submitted by the parties, and, on the 12th day of March, 1965, this Honorable Court reversed the judgment, remanding the cause for further proceedings.

Pursuant to certain language contained in the opinion of this Honorable Court, the District Court, on June 2nd, 1965, held an evidentiary hearing to determine whether the "discovery rule" should be applied to determine when Appellant's cause of action accrued. Thereafter, on the 22nd day of June, 1965, the District Court filed its Memorandum Decision, including findings of fact and conclusions of law, determining that the "discovery rule" ought not to be applied in this case. On the 19th day of July, 1965, the District Court filed findings, conclusions and a joint order adverse to Appellant herein and, thereafter, Appellant having amended her Complaint, the Appellees moved for Summary Judgment. On the 23rd of August, 1965, the motion for summary judgment came on for oral argument. On the 22nd day of September, 1965, the motion for summary judgment having been granted, the District Court entered its judgment of dismissal with prejudice.

Appellant duly filed her notice of appeal, statement of points on appeal and designation of contents of record on appeal. Each of these documents were filed on or about the 16th day of October, 1965.

The jurisdiction of the District Court was properly invoked, the Court having original jurisdiction of the

action under 28 U.S.C.A., Section 1332. This said jurisdiction existed because the parties are citizens of different states and the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs. This Honorable Court has jurisdiction to review the order and judgment entered by the District Court under the provisions of 28 U.S.C.A., Section 1291.

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## STATEMENT OF THE CASE

Appellant's amended complaint was filed pursuant to motion and leave granted by the District Court. The said amended complaint sets forth four causes of action or claims for relief. Omitting the jurisdictional allegations, the complaint alleges in substance that Appellees White, Popma and McCarter were and are physicians and surgeons duly licensed to practice under the laws of the State of Idaho and that Appellee McCarter was and is a duly licensed pathologist. During the month of August, 1951, plaintiff employed Appellee Popma to examine and diagnose a lump in plaintiff's left breast. Thereafter, plaintiff-Appellant was advised by Appellee Popma that a biopsy should be done on this lump and Appellee White was employed to perform the biopsy. The biopsy was performed and Appellee White at first advised Appellant that the lump was not cancerous, later informing her that the first diagnosis had been in error, that the lump was malignant and that it was necessary to perform a certain surgical procedure known as a "radical", involving the removal of Appellant's left

breast, the stripping of the lymph glands from under her arm. Further, that in fact the tissue removed during the biopsy was benign, i.e., not cancerous, and that Appellant did not discover this fact and that the "radical" surgery was unnecessary until the Fall of 1962; that prior to that time plaintiff was not aware of any fact which could put her on inquiry or give her notice that the lump in her breast was in fact benign, that plaintiff could not have discovered such fact, i.e., that the lump was benign, at any earlier date through due and reasonable diligence. Further, the amended complaint alleges that Appellant was a married woman up to and including the 1st day of September, 1959, and that Appellant continued to be the patient of Appellee White and to rely upon his skill and judgment up to and including the 1st day of September, 1961. Appellee White is alleged to have absented himself from the state of Idaho, remaining absent ever since, on or about the 1st day of September, 1961. The first claim for relief further alleges that Appellee McCarter was negligent in his examination and analysis of the tissue taken from the lump in Appellant's left breast and that he negligently misdiagnosed the said tissue as being cancerous.

In the second claim for relief, Appellee White is alleged to have acted negligently in failing, after receiving two conflicting diagnoses from Appellee McCarter, to use due and proper care to determine whether the tissue taken from the lump in Appellant's left breast was in fact cancerous. In the third claim for relief, the performance of the biopsy and the

tissue analysis being alleged to have been under the exclusive control and management of Appellees, it is pleaded that Appellees acted negligently in conducting the handling, preparation, examination and analysis of the tissue taken during the said biopsy and that, had the aforesaid handling, preparation, examination and analysis been properly done, a correct diagnosis would have been made and Appellant would not have undergone an unnecessary, painful and disabling operation. In the fourth claim for relief, it is alleged that Appellees, following the "radical" surgery, unnecessarily, negligently and carelessly subjected the Appellant to extensive radiation treatments.

The crucial allegations of the pleadings, for the purpose of this appeal, are then those dealing with Appellant's marital status, the absence of Appellee White from the State of Idaho, and that Appellant did not discover the negligent misdiagnosis and the fact that the lump in her left breast had been benign until the Fall of 1962, coupled with an absence of any fact which could put Appellant on inquiry or give her notice that the diagnosis had in fact been in error. Coupled with this last mentioned allegation, are the pleaded facts that Appellant continued, until September of 1961, to be the patient of Appellee White and to rely upon his skill and judgment.

## STATEMENT OF FACTS

As previously stated, the District Court held a fact-finding hearing, the transcript record of which is among the papers brought up on this appeal. Since the determination of this appeal turns not only upon those facts alleged in Appellant's Complaint, but also upon the evidence adduced in support of and in opposition to the pleaded allegations, it is essential to set forth a brief recitation of this evidentiary matter. In doing so, page citations will be given wherever possible, coupled with line citations when necessary. Citations to pages of the transcript of the June 2nd hearing will be designated with an "R."

Appellee Raymond L. White testified both as an adverse witness called by Appellant and in his own behalf. He first saw Appellant on August 22, 1951. On the 23rd or 24th of August, 1951, he did a biopsy of her left breast; on September 1st, 1951, a radical mastectomy of the left breast was performed by him. (R. 25:1-18.) He continued to see Appellant for routine post-operative visits and necessary dressings after surgery until December of 1951 and then saw her early in the Spring of 1952. (R. 25:23-25.)

In April of 1956, Appellee White saw Appellant again for a routine physical examination and discovered that she had a tumor of the right lobe of the thyroid. Thereafter, he performed a thyroidectomy. (R. 26:4-14.) He continued to see Appellant intermittently during the year 1956, corresponded with her and believed that he had seen her in 1957. (R. 26:20-27:4.) The correspondence was in regard to the guid-

ance which she needed for medical treatment and maintenance of her metabolism, related to the thyroidectomy. (R. 27:5-11.)

Appellee White saw Appellant as a doctor twice in 1958. When Appellant moved to California in 1959, she continued to correspond with Appellee White and ask him for assistance in connection with renewing certain prescriptions and in locating a physician to treat her in California. (R. 31:10-25.)

Called as a witness in his own behalf, Appellee White testified that he last saw Appellant in relation to the breast problem in the month of April of 1952. He next saw her on January 27, 1956. (R. 188:13-19.) He did not see Appellant in 1957, but saw her in August of 1958, at which time he did a complete physicial examination as a general checkup for health. (R. 189:13-19.) The letter from Appellant, asking for renewal of prescriptions and assistance in locating a physician in California was received in 1959 and his reply was dated October 31, 1959. (R. 189:20-25.)

At the time of the biopsy, the lump in Appellant's left breast was removed. The second surgery, i.e., the radical mastectomy, involved the removal of the tissue of the breast and certain surrounding tissue. (R. 193:11-21.) Following the biopsy, Appellee White told Appellant that on gross examination of the tissue removed, i.e., the tumor mass per se, it appeared to be benign, but that they would have to wait for the microscopic sections in order to make a final diagnosis. (R. 194:8-17.) Following the radical mastectomy, Appellee White told Appellant that she had cancer

and he expected her to accept this as a fact. (R. 205:17-24.) He also told her that it was his considered conclusion that she had cancer and that she should have follow-up service. (R. 207:3-8.)

Appellant herein testified as a witness in her own behalf. In the year 1951, she was a married woman; she was divorced in August of 1959. (R. 99:13-19.) She had nurse's training at Good Samaritan Hospital in Portland, Oregon, becoming a licensed registered nurse in 1943. (R. 147:7-16.) In 1948, she received a bachelor of science degree in education from the University of Utah, this being essential to teaching nursing. (R. 147:19-147(a):8.) In her training and experience there was no specific study of the subject of breast tumors. (R. 147(a):9-13.) In the Fall of 1948, she was medical nursing supervisor, Department of Medicine, for a Dr. Wintrobe in Utah. He was a hematologist and this involved some special work in the field of cancer. (R. 155:22-156:5.) As an undergraduate, she had cared for patients who were being treated for breast cancer, but had not done so since graduation. (R. 155:15-21.) She did not, through her association with Dr. Wintrobe, develop a special interest in the field and subject of malignancies. (R. 156:6-9.)

To the extent that Appellant had any specialty within the field of nursing, it was in the field of medicine rather than surgery. (R. 151:1-7.) She did not, as a nurse, make it her personal business to read about breast cancer and inform herself on the subject; as a patient, she did so in 1951 at St. Luke's Hospital. (R. 151:19-152:6.)

Appellant knows a little about pathology, but nurses do not work in pathology, this field being reserved for technicians. (R. 118:18-119:1).

Appellant had lived in Salt Lake City and worked at Salt Lake General Hospital for about a year and a half, following which she lived in Pocatello, Idaho, for several months. She then came to Boise, Idaho, where she did not work as a nurse. (R. 100:18-101:4). In August of 1951, while she was living in Boise, she discovered a lump on her breast. She telephoned a doctor with whom she had worked at Salt Lake General Hospital, told him she was new in Boise and asked if he knew anyone in Boise she could see. This doctor recommended to her Appellee Popma. (R. 101:5-25.) She saw Appellee Popma who examined her and advised her that the lump should be surgically removed and examined, i.e., that a biopsy be done. (R. 102:1-10). Appellant was furnished by Appellee Popma with a list of three surgeons, including the name of Appellee White. She made inquiries concerning Appellee White, as she knew that if the biopsy turned out to be malignant, a radical would be done. (R. 102: 11-103:6.) She sought advice and selected what she believed to be the best doctor. (R. 103:6-9.)

At this stage, Appellant, through her work with doctor Wintrobe, a leader in the field of malignant blood disorders, had the feeling that she should take her time in selecting a surgeon and then, once the surgeon was selected, do precisely what the surgeon advised. (R. 103:11-24.)

On August 26, 1951, Appellee White performed the biopsy. That biopsy was followed by his advice to her

that the tissues were benign. The next day, he telephoned to tell that there had been a mistake, that they found some malignant tissue cells and that she was to be in the hospital the next morning. (R. 104: 11-24.) The radical mastectomy was performed by Appellee White on August 28, 1951. (R. 104:23-105:1.)

Immediately following the radical mastectomy, Appellee White discussed with Appellant the report which showed a finding of cancer. (R. 105:25-106:1.) She was concerned whether she was going to live or die and Appellee White told her: "Well, of course, I don't know, but we are going to do everything we can to see that you live." and Appellee White then outlined the follow-up treatment to be pursued. He told her that all of the tissue near the site of the tumor which they could excise would be taken and that since a pregnancy could activate a malignancy, they would radiate the chest and the ovaries to prevent pregnancy. (R. 106:4-25.) She subsequently underwent this series of radiological treatments. (R. 107:1-9.)

This brought on a menopause at the age of 30; she underwent the treatments because she believed that she had cancer. The reason she stayed with Appellees as her doctors was that she believed in them. (R. 107:12-25.)

In February of 1952, Appellant moved to Pocatello. (R. 108:3-10.) To the best of Appellant's recollection, in the years 1952 through 1956, she saw Appellee White once. In examining Appellant in 1956, Appellee White found an enlargement in the thyroid and said, "In view of your history, Anita, I think we had better get it out." (R. 112:8-113:5.)

In the years 1956 through 1959, Appellant testified that she saw Appellee White for check-ups and examinations at least once per year. She had complete physical examinations and blood work, and received considerable reassurance from Appellee White. (R. 115:3-116:1.)

Examined in regard to her conversations with Appellee White following the radical mastectomy Appellant testified that Appellee White, referring to the malignant tissue, said, "I think we got it all." and showed her the pathology report, which showed they had found no malignancy. (R. 116:13-25.) As Appellant understood the pathologist's reports (Exhibits 5 and 6) the report from the biopsy (Exhibit 6) showed the existence of a lesion and cancerous tissue, the report from the radical mastectomy (Exhibit 5) showed that there had been a carcinoma in the lesion, but that no malignancy was found in the surrounding tissues. (R. 164:14-168:1.)

In 1959, Appellant moved to California. She stopped in Boise on her way to report to her job and saw Appellee White at that time. She had been doing some volunteer work for the American Cancer Society prior to that time and was aware that, in terminology of people working with cancer, they do not say that the patient is cured, only that they have survived for a certain period of time. She consulted with Appellee White who advised her that in his opinion she could work and get along alright. (R. 116:25-117:19.) In California, Appellant went to work for the Veterans Administration Hospital as a staff nurse, later becoming a nursing supervisor. (R. 117:23-118:12.) She

originally worked at Livermore, California, and then was sent in April of 1960 to Palo Alto to help open the new Veterans Administration Hospital there. (R. 119:2-18.) At Palo Alto, Appellant met Dr. Shaw, an oncologist, a specialist in cell structures. (R. 119:19-120:7.) Dr. Shaw gave a lecture involving the early detection of breast malignancies. (R. 120:19-25.) This was in 1962 and, since she had not had a physician since she left Idaho, Appellant decided to ask Dr. Shaw if he would follow her case, Dr. Shaw agreeing to do so. (R. 121:7-25.) He said that she should have continued check-ups and asked her to sign a consent form so that her prior medical records could be sent to him. (R. 122:1-25.) During August of 1962, after he had obtained the records, Dr. Shaw called her to his office and told her that she had not had cancer. (R. 123:12-126:1.) What Dr. Shaw told her was that the Stanford Laboratory had examined the slides and had reached the opinion that they did not show cancer. He also said that he would communicate this to Appellee St. Luke's. (R. 175:5-15; 177:5-9.) She at this time concluded in her own mind that she had a claim for malpractice and consulted an attorney. (R. 178:17-25.)

Appellee McCarter testified that he had been, since the year 1951 until the present time, in charge of the pathology department at St. Luke's Hospital. (R. 71:13-72:3.) In or about September of 1962, he received a letter from Dr. Shaw advising him of the results of the re-examination of the slides in this case. (R. 78:2-25.) This letter was marked as Exhibit 9. Slides are constructed by placing a tissue specimen

between two pieces of glass and sealing them so that they are airtight. (R. 85:25-86:3.) The slides in this case are still in Appellee McCarter's custody. (R. 86:4-7.) All of the records and files of St. Luke's Hospital concerning Appellant are still in existence and available. (R. 88:1-9.) This file includes the opinions and findings and diagnoses and all records thereof and all of the reports and summaries. (R. 88:12-25.) Called as a witness in his own behalf, Appellee McCarter testified that the slides were fourteen years old and that there had been some deterioration which, to some degree, made it more difficult to interpret the slides. (R. 240:1-19.) This fading is in color and the slides are not as distinct in appearance as they were in 1951. (R. 246:19-25.) However, it was possible to make a diagnosis from these slides with "proximate certainty" as of the time of the hearing in this case. (R. 254:1-7.) The certainty is not as great as it would have been five or even two years prior to the hearing. (R. 254:9-14.) However, this was with approximately the same degree of certainty as fifteen years prior to the hearing.

In attempting to establish the difficulty of trying this law suit, Dr. McCarter further testified that little was known about selerosing adenosis (the diagnosis arrived at by the Stanford Laboratory from Appellant's slides) in 1951, that a great deal of information had developed since that time. (R. 241:1-22.) Other than a Dr. Carl in Twin Falls, Idaho, Appellee McCarter could recall no pathologist who had been in the immediate area in 1951 and was still in the same geographical area around Boise. (R. 243:4-20.)

Appellee White was also called as a witness in his own behalf. On cross-examination, he testified that, following the radical mastectomy, he believed that Appellant had had cancer. He informed her of this. He certainly communicated this to her in such a manner that he expected her to accept it as a fact. It was part of his treatment to convince her that she had a situation that she had to live with. (R. 205:6-206:1.) It is part of good medical procedure to tell a patient following surgery for cancer, that they should have follow-up and periodic check-ups. He told Appellant that it was his considered conclusion that she had had cancer and that she should have follow-up service. (R. 206:25-207:8.)

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## SPECIFICATIONS OF ERROR

### I

The Evidence is Legally Insufficient to Support the Findings of Fact Entered by the Court

### II

The Trial Court Applied an Erroneous Legal Standard in Determining the Applicability of the "Discovery Rule"

### III

The Trial Court Erred in Granting the Motion to Dismiss

## ARGUMENT

### I

### THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF FACT ENTERED BY THE COURT

In the Memorandum Decision filed June 22, 1965, the Trial Court, in support of its conclusion that the "discovery rule" should not be applied in this case, made twelve findings of fact. In large part, the Summary Judgment of Dismissal from which this appeal is taken, depends upon these findings of fact. Appellant moved the Court to amend and make supplemental findings of fact, tendering some 33 proposed findings of fact. The motion was denied and the final judgment of the Trial Court incorporated the prior findings of fact by reference.

It is Appellant's intention to demonstrate, in this portion of the brief, that certain of the findings of fact made by the Trial Court are supported by no or insufficient evidence. Further, certain of the findings of fact tendered by Appellant should have been adopted by the Court. As a preliminary matter, however, it is necessary to discuss the legal standard applicable to the making of such findings of fact. This being a diversity action, State law, including that governing the accrual of a cause of action and the statute of limitations, governs. *Ragan v. Merchant Transfer and Warehouse Company, Inc.*, 337 U.S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949). State rules as to the burden of proof govern in this diversity action. *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 651 (1943).

Under Idaho law, where the statute of limitations is set up in an answer, it is error to grant judgment on the pleadings, as the case should proceed to proof. *Chemung Mining Company v. Hanley,* 9 Idaho 786, 77 Pac. 226 (1904). The "discovery rule" dealing with the accrual of a cause of action for medical malpractice is new to Idaho, having been first established in the case of *Billings v. Sisters of Mercy of Idaho,* 86 Idaho 485, 389 P. 2d 224 (1964). Nevertheless, Idaho has had extensive experience with an identical rule applied to the accrual of a cause of action for fraud. Thus, in *Gerlach v. Schultz,* 72 Idaho 507, 244 P. 2d 1095 (1952), it was noted that, in an action for fraud, the statute of limitations starts to run only from the time when the fraud is discovered or, in the exercise of reasonable diligence, should have been discovered. This case involved an appeal from a trial to the Court alone, sitting without a jury. Here, despite the fact that the fraud could have been discovered by the inspection of instruments which the defendant had caused to be recorded and which thus gave "constructive notice", the Appellate Court found the evidence sufficient to sustain the Trial Court's finding that the statute of limitations had not run to bar the action. Cf. *Galvin v. Appleby,* 78 Idaho 457, 305 P. 2d 309 (1956). Where the statute of limitations is pleaded in an answer, it becomes an affirmative defense and the burden of proving this defense is upon the defendant. *Pauley v. Salmon River Lumber Company,* 74 Idaho 483, 264 P. 2d 466, 471 (1953).

Thus, while the Trial Court manifestly believed that the defense of the statute of limitations presented a

preliminary matter to be disposed of under Federal law, the law of Idaho governed; the Idaho law placed the burden of proof upon the defendants and, in accordance with *Chemung Mining Company v. Hanley,* supra, the defense should have been resolved by the trier of fact. Both the original and first amended complaint in this case demanded trial by jury.

In essence, this case comes before this Honorable Court on appeal from a summary judgment. The defense of the statute of limitations may properly be asserted by motion for summary judgment. *Gifford v. Travelers Protective Association,* 153 F. 2d 209, 211, 9th Cir. 1946. Appellant concedes that the device of summary judgment is available in this type of case; Appellant denies that the device was properly applied.

Summary judgment is proper, under Rule 56, Federal Rules of Civil Procedure, only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. *Sartor v. Arkansas Natural Gas Corporation,* 321 U. S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967 (1944); *Poller v. Columbia Broadcasting System,* 368 U. S. 464, 468, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962). The burden is upon the moving party to show clearly that there is no genuine issue of fact and the function of the Trial Court is to determine whether such issue exists, not to resolve the issue. *Byrnes v. Mutual Life Insurance Company of New York,* 217 F. 2d 497, 9th Cir., 1954. Unless the pleadings, depositions, and admissions in the file fail to show the lack of a genuine issue as to any

material fact, the motion for summary judgment should be denied. *Sequoia Union High School District v. United States,* 245 F. 2d 227, 9th Cir., 1957.

Where the determination of a summary judgment motion requires the Trial Court to choose between conflicting possible inferences from the evidence, the motion should be denied. The drawing of inferences arising from the evidentiary facts, whether these evidentiary facts be disputed or not, is for the trier of fact. *Sarkes Tarzian, Inc. v. United States,* 240 F. 2d 467, 470, 9th Cir., 1957. Cf. *Vokal v. United States,* 177 F. 2d 619, 621, 9th Cir., 1949. On appeal from the granting of summary judgment, the allegations of fact in the non-moving party's reply to the motion are to be accepted as true. *Apache Land and Cattle Company v. Franklin Life Insurance Company,* 145 F. 2d 964, 9th Cir. 1944.

Appellant's research has uncovered three Federal cases dealing with the granting of summary judgment on the grounds that the statute of limitations had run where the date of accrual of the cause of action by reason of "discovery" was in dispute. In each of these cases, analyzed below, the Trial Court's action was reversed.

In *Tracerlab, Inc. v. Industrial Nucleonics Corporation,* 313 F. 2d 97, 1st Cir., 1963, the Court was dealing with a Massachusetts statute which provided that the period of limitations where there was a fraudulent concealment of the cause of action, started to run from the time when the plaintiff discovered its existence. Summary judgment of dismissal had been granted on the ground that the plaintiff's discovery

came more than two years prior to the filing of the complaint. The depositions of plaintiff's principal officers showed that they "suspected" the pirating of their trade secrets (which gave rise to the cause of action) more than two years prior to filing. Nevertheless, their attempts to get the facts had proved unsuccessful until sometime within the statutory period. The First Circuit Court of Appeals held that it must view the evidence in the light most favorable to the party against whom the motion had been granted and that, as there was a genuine issue of material fact as to whether the plaintiff had knowledge, as opposed to suspicion, more than two years prior to filing, the summary judgment of dismissal was reversed.

*R. J. Reynolds Tobacco Company v. Hudson,* 314 F. 2d 776, 5th Cir., 1963, was a diversity case governed by Louisiana law. It involved cancer caused by the defendant's tobacco products. Summary judgment was granted on the ground that plaintiff had failed to bring his action within the statutory period following his knowledge of the fact that he had cancer. Louisiana, in *Perrin v. Rodriguez,* 153 So. 555, had adopted the "discovery rule" in medical malpractice cases. Drawing an analogy to such cases, the Court held that the statute would start to run only from the time when the plaintiff knew or should have known that he had an actionable injury which was attributable to his smoking. After reciting the usual rules as to summary judgment being proper only when there was no issue of fact, the Court stated:

> ". . . we hold that prescription commenced to run from the time the disease manifested itself to the point where Hudson knew, or should have

known, that the damages he sustained, which were the subject of this suit, resulted from smoking the defendant's tobacco products. When this took place is a jury question . . ."

*R. J. Reynolds Tobacco Company v. Hudson,* supra, 314 F. 2d at 786.

*Sheets v. Burman,* 322 F. 2d 277, 5th Cir., 1963, was a medical malpractice action. Plaintiff alleged that, during surgery in February of 1947, defendant negligently left a curvilinear surgical needle in her abdomen and that she did not discover that this was the cause of her continuing pains until October of 1957. The action was filed November 12, 1959. The operation took place in Indiana, but defendant moved from Indiana to Louisiana in 1950, returning to Indiana in 1953, and examining plaintiff on one or two occasions in 1954. In that same year, he moved to Mississippi. The case involved a sporadic series of visits by plaintiff to defendant and a substantial issue as to whether or not that constituted continuing treatment and care by defendant. Citing and relying upon *Perrin v. Rodriguez,* supra, and *R. J. Reynolds Tobacco Company v. Hudson,* supra, the Court held that there were disputed issues of fact as to when the doctor-patient relationship ended and when knowledge of the act causing the damage was acquired. This being so, the granting of summary judgment was improper.

Thus, there is presented to this Honorable Court a serious question as to whether, in making its findings of fact, the Trial Court should have applied a

rule of the preponderance of the evidence or, under the Federal authorities just above cited, the usual rule applicable to motions for summary judgment. In any event, it is clear under Idaho law, that the burden of making out the defense was upon Appellees. As to some of the findings of fact made by the Trial Court and some of the proposed findings of fact rejected by that Court, the preponderance of evidence was for Appellant. As to others, there were disputed issues of fact which, it is very respectfully submitted, should have been left for resolution by the jury.

The Trial Court's first finding of fact was:

> "That the plaintiff was, for a number of years prior to the surgery, a registered nurse, actively pursuing her profession, and was a college graduate with a degree of bachelor of science in that field."

In fact, the evidence adduced showed that Appellant's degree was in education in order that she might teach nursing.

The second finding of fact was:

> "That she remained, during all of the time after the surgery, actively in the nursing profession, working in hospitals, and was also active in cancer prevention work."

The only evidence upon this point was the testimony of Appellant herself. She testified that she had never, since she became a registered nurse, worked in the operating room. (R. 154:1-6.) Following the surgery, when Appellant moved to Pocatello, she worked at Bannock Memorial Hospital, teaching nursing. (R.

108:25-109:7.) Between 1952 and 1956, she was in Montana and did not work. (R. 114:7-20.) In 1956 she started doing volunteer work for the American Cancer Society and they paid her way to Boise twice a year. (R. 114:20-25.) In 1959, she returned to active nursing work when she moved to California and accepted a job with the Veterans Administration. (R. 117:23-118:4.) Appellant's cancer prevention work with the American Cancer Society consisted of organizing volunteers to teach cancer prevention and to collect money on the lay level and without pay. (R. 183:13-25.)

The seventh and eighth findings of fact recite that Appellant knew at all times that her hospital records and the slides on which the diagnosis had been predicated were available and that she made no investigation to determine the accuracy of this diagnosis. These findings of fact are, in and of themselves, correct; nevertheless, there was no evidence that Appellant ever, until Dr. Shaw communicated the findings of the Stanford Laboratory to her, had any reason to doubt the accuracy of the original diagnosis.

The tenth finding of fact was to the effect that the slides are now deteriorated to some degree. This also is, in and of itself, correct. Nevertheless, Appellee McCarter testified that he was able, a few weeks prior to the hearing, to reach a diagnosis from examining the slides. (R. 254.)

The Trial Court's twelfth finding of fact is to the effect that, while Appellant sometimes sought out Ap-

pellee White for medical attention, she also saw and consulted other physicians and did not rely solely on Dr. White for medical advice and treatment. There is a further finding that there was not a continuing relationship of doctor and patient after the post-operative surgery and treatment in the usual sense. The testimony revealed that, in 1956, Appellee White advised her to have a thyroidectomy and premised such advice upon her past history of cancer. Further, Appellant testified that she relied upon Appellee White in the field of cancer. It was apparent from the evidence that, insofar as continuing observation and treatment of Appellant for the original malignancy was concerned, Appellee White was her only physician up to and including the time when she asked Dr. Shaw to care for her. Thus, Appellant continued to rely upon Appellee White, his original diagnosis, his continuing advice, and his continuing observation and treatment up to the Fall of 1962.

Turning to Appellant's proposed findings of fact which were rejected by the Trial Court, the second proposed finding was to the effect that Appellant was not trained, nor did she qualify as a pathologist, nor was she skilled in the diagnosis of cancer or the reading of microscopic slides, x-rays, or making any diagnosis of cancer. The sole evidence on this point was the testimony of Appellant which was in accord with the proposed finding. It should have been adopted.

The third proposed finding was to the effect that Appellant, by reason of her schooling and profession, had adopted the philosophy that, once a physician or

surgeon had been selected, the patient should place their confidence in that physician or surgeon and follow his professional treatment and advice. The sole evidence produced on this point was the testimony of Appellant; based upon that testimony, the proposed finding should have been adopted. The eleventh proposed finding of fact was to the effect that Appellant, during the years following her surgery, had unlimited confidence in her doctors and was convinced that she had had cancer. The only testimony on this point was that of the Appellant, supporting the proposed finding. The Trial Court erred in rejecting this proposed finding.

The twelfth proposed finding of fact was to the effect that Appellant, when a lump on her thyroid was discovered by Appellee White, was advised by him that a thyroidectomy was in order because of her history and that such thyroidectomy was thereupon done. The only evidence in the record, including the testimony of Appellant and Appellee White, was in accord with this finding, which should, accordingly, have been adopted.

The thirteenth proposed finding of fact indicated that Appellant continued to see Dr. White for check-ups and continued to obtain her prescriptions for thyroid through him. This was in accord with the only evidence on this point and should have been adopted.

The twentieth proposed finding of fact was to the effect that the communication to Appellant by Dr. Shaw of the Stanford Laboratory diagnosis of the

tissue section was the first notice which she had which might reasonably have caused her to suspect or doubt the accuracy of the 1951 diagnosis. There was no evidence in this record that Appellant was, at any time between surgery and the Fall of 1962, advised or informed that there was any reason to doubt the accuracy of Appellee's diagnosis; accordingly, the proposed finding should have been adopted.

The twenty-second proposed finding recited that there had been no change in the shape, size, variation or deviation from normal structure of the cells contained within the tissue section slides and that they were still available, and that diagnosis and evaluation could be made from them. This was in accord with the testimony of Appellee McCarter and the proposed finding should have been adopted.

The twenty-third proposed finding of fact was simply that Appellees McCarter, White and Popma were all living and available to testify in their own defense. This was manifest from the record and the Court should have adopted this proposed finding.

In short, the Trial Court, whether applying a preponderance of the evidence test or the usual rules applicable to motions for summary judgment, should have found the following: Appellant was a registered nurse and had received a bachelor of science degree in education. She had worked as a medical, as opposed to a surgical, nurse and had never since graduation treated or cared for a patient suffering from breast cancer. In August of 1951, she discovered a lump in her breast and sought medical attention. Thereafter,

Appellees performed a biopsy, consisting of a surgical removal of the lump. Tissues taken from this lump were placed in glass slides. Initially, the diagnosis reported to Appellant was that these tissues were benign. One or two days thereafter, Appellant was informed by Appellees that the tissues were malignant. Relying upon Appellees' advice, Appellant submitted to a radical mastectomy, followed by six weeks of saturation radiation, which sterilized her. As part of his treatment, Appellee White endeavored to convince Appellant not only that she had suffered from cancer, but that follow-up care and periodic examinations were essential. He discussed with her the pathologist's reports, which showed the original lump to have been malignant, but indicated that all of the malignancy had been contained within that lump. Appellant, between the years 1951 and 1956, continued to see Appellee White periodically for examinations. In 1956, Appellee White advised her that, in view of her past history of cancer, a lump on her thyroid should be surgically excised. This was done. Appellee White continued to advise Appellant up to and including the time she moved to California in 1959. While Appellant had been involved in volunteer work for the American Cancer Society, this involved no special expertise in the diagnosis of cancer or in the examination of tissues. In 1959, Appellant moved to California. In 1962, Appellant consulted Dr. Shaw, for the sole purpose of continuing the periodic observations and treatments advised by Appellee White. Up to and including that time, Appellant had never suspected that there was any question as to the accuracy of the

original diagnosis in her case. Dr. Shaw obtained Appellant's consent for release of her prior medical records. Among those medical records forwarded to him by Appellee St. Luke's Hospital, were the slides of the tissue sections taken from the biopsy in 1951. Dr. Shaw referred these for pathological examination by the Stanford Laboratory and the report indicated that there had never been a malignancy, that there was a condition known as sclerosing adenosis, which is not malignant. Dr. Shaw so advised Appellant and also so advised Appellees. Within one year thereafter, suit was brought.

The slides were available at St. Luke's Hospital at all times, provided request was made. They are presently somewhat deteriorated, but, as admitted by Appellee McCarter, an accurate diagnosis can be made at this time from these slides. All of the individual Appellees are living and all of the medical records, reports and summaries are still available.

As will be developed, infra, even on the facts found by the Trial Court, the legal conclusion reached was erroneous. Nevertheless, a correct finding of fact would have made clear the applicability of the Idaho "discovery rule" and the Trial Court erred to the substantial prejudice of Appellant herein in making its erroneous findings of fact.

## II

### THE TRIAL COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN DETERMINING THE APPLICABILITY OF THE "DISCOVERY RULE"

The Trial Court initially erred in applying a preponderance of the evidence rule and placing upon Appellant the burden of demonstrating that the statute of limitations had not run. This much was pointed out in argument under the first heading, above. In addition, the Trial Court, in applying or considering whether to apply the "discovery rule" specifically concluded as a matter of law: That plaintiff *could* have, by exercise of due diligence, discovered the alleged malpractice at any time after the surgery and treatment complained of." The "discovery rule" as enunciated in *Billings v. Sisters of Mercy of Idaho,* supra, is that the cause of action accrues when the patient learns, "or in the exercise of reasonable care and diligence *should* have learned . . ." of the negligent injury. *Billings v. Sisters of Mercy Hospital,* supra, 389 P. 2d at 232.

There is no doubt whatsoever in this case that Appellant *could,* at any time, have asked for a further pathological study. The crucial issue is whether she *should* have done so. There is a manifest difference between the availability of information and the possession of sufficient facts to require the party to make inquiry. As noted by the Idaho Court in *Gerlach v. Schultz,* supra, in an analogous situation, the ready availability of certain facts (there contained in recorded documents which gave constructive notice) does not mean that a party is charged with the duty

of having discovered those facts. In the case at bar, the issue is not whether it was possible for Appellant to acquire information, but whether the law imposed upon her a duty to do so.

As will be seen in the argument under the third heading, infra, the action of the Trial Court was in error. This error was largely contributed to by the Trial Court's application of a standard which made Appellant's cause of action accrue when she *could*, as opposed to when she *should* have discovered the negligence of Appellees herein.

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## III

### THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS

Following the rendition of its findings of fact, and conclusions of law, the Trial Court granted leave to Appellant to amend her Complaint. She did so, specifically alleging her marital status and Appellee White's absence from the jurisdiction. Thereafter, based upon the findings of fact and conclusions of law previously rendered, the Trial Court granted Appellees' motion for summary judgment. In granting this summary judgment of dismissal, the Trial Court erred.

As pointed out above, this case is governed by Idaho law, including that applicable to the accrual of a cause of action, the period and the tolling of the statute of limitations.

The negligent misdiagnosis was made on the 23rd or the 24th of August of 1951. The radical mastectomy was done on or about the 28th day of August, 1951. The radiation treatments were administered during the following six weeks. The action was filed on October 11, 1963. Section 5-219 of the Idaho Code provides a two year statute of limitations for an action to recover damages for an injury to the person. Section 5-201 of the Idaho Code requires that actions be commenced within the periods prescribed after the cause of action shall have "accrued".

The principal question raised is when the cause of action "accrued". That was before this Honorable Court on a prior appeal. In its decision (342 F. 2d 817) this Court reversed the prior judgment of dismissal and held that the "discovery rule" *might* be invoked. Continuing, the prior opinion also indicated that the question was one of law for the Court; that an Idaho Court would consider factors other than the diligence of the plaintiff in determining when the cause of action had accrued, i.e., that a diligent plaintiff might be barred prior to "discovery".

There is no blinking the fact that a portion at least of the Trial Court's error in this case is attributable to certain language found in the first appellate opinion. Despite natural reluctance to criticize that opinion, Appellant must point out that these portions had themselves no foundation in Idaho law. Despite any invocation of "law of the case", it is open to Appellant at this time to undertake that task. An Appellate Court on a second appeal may review and revise a

conclusion reached on the first appeal. The former decision is "the law of the case" only as to the lower court. *Messinger v. Anderson,* 225 U. S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152; *Reynolds Spring Company v. L. A. Young Industries,* 101 F. 2d 257, 259, 6 Cir., 1939. Cf. *Mercer v. Theriot,* 377 U. S. 154, 83 S. Ct. 1159, 12 L. Ed. 2d 206. At most, the doctrine of "law of the case" involves a reluctance to exercise power which the appellate court doubtless possesses. *Lumbermen's Mutual Casualty Company v. Wright,* 322 F. 2d 759, 763, 5th Cir., 1963. This reluctance should be considerably lessened in a diversity case where the "law of the case" involves a misconception as to the governing State law.

Thus, this Honorable Court indicated (342 F. 2d at 819) that, under Idaho law, the accrual of plaintiff's claim was a question of law for the Court alone. While Idaho's first (and so far, only) experience with the "discovery rule" as applied to medical malpractice actions was that in *Billings v. Sisters of Mercy Hospital,* supra, Idaho has had considerable experience with that rule as applied to actions sounding in fraud. Thus, as indicated above, Idaho has held that where the defense of limitations is raised other than by demurrer, it is error to determine it by judgment on the pleadings. *Chemung Mining Company v. Hanley,* supra. The date of accrual by discovery has been left as an issue of fact for trial. *Galvin v. Appleby,* supra; *Gerlach v. Schultz,* supra. The invocation of the defense by answer places the burden of proof upon the defendant. *Pauley v. Salmon River Lumber Company,* supra. This Court's dictum, re-

grettably erroneous, led the Trial Court to deny Appellant her right to have the matter of her diligence determined by the trier of fact, i.e., the jury; also, it led the Trial Court to ignore the usual rules governing the granting of summary judgment.

Further, the first appellate opinion in this case (342 F. 2d at 820) at least intimated that Idaho would decline to apply the discovery rule absent such factors as a continuing relationship of doctor and patient, inherent difficulty of discovering certain wrongs, the availability of witnesses and records, etc. It was hinted that Appellant might be barred even though reasonably diligent if undue prejudice were shown. Each of these factors was stated as being at least possibly one to be considered prior to application of the discovery rule, rather than an integral part of such rule. Here, too, there was a misconception of the Idaho law.

The initial question of whether Idaho would apply the "discovery rule" to medical malpractice cases was answered in part in the landmark case of *Billings v. Sisters of Mercy of Idaho,* supra. The first appeal in this case involved the subsidiary question of whether the discovery rule would be limited to cases involving foreign objects left in the patient. It was determined that there was no such limitation.

In *Billings v. Sisters of Mercy of Idaho,* supra, surgery had been performed on July 10, 1946. The patient experienced considerable post-operative pain during the time that she remained under the defendant's care through the year 1947. From then through

1958, she consulted various doctors and from 1958 through May of 1961, she saw doctors outside the State of Idaho. In May of 1961, surgery was performed and a gauze sponge was found within her abdomen. Her complaint alleged that she had suffered continuous pain since the time of the 1946 operation and had consistently attempted to find out what was causing the pain.

Parenthetically, the defendant doctor was dead at the time of suit. In a lengthy and scholarly opinion, the Idaho Supreme Court considered four possible bases of a holding that the plaintiff's cause of action had not accrued until within two years of the filing of her complaint. The first three, i.e. continuing negligence, the contract theory and fraudulent concealment, were rejected. The doctrine of "continuing negligence" (that the doctor has a continuing duty to remove the object left in the patient and therefore is guilty of continuing negligence until the object is removed) was rejected, since the pleading showed that the plaintiff had severed her connection with this doctor many years prior to suit. (389 P. 2d at 230.) The Court found it impossible, in the context presented, to accept the "inherently unknowable harm" doctrine, finding it not much used in foreign object cases. (389 P. 2d at 230.) The use of the "contract" theory and the "fraudulent concealment" rule were likewise rejected. (389 P. 2d at 230.) The Court then stated that it was not a technical breach of duty which commenced the statutory period running, but the existence of a practical remedy. (389 P. 2d at 231.) Further, the plaintiff could not be guilty of

"sitting on her rights", because she could not sit on rights of which she was unaware. (389 P. 2d at 231.) The conclusion of the Court was that the cause of action did not accrue until the patient learned, or in the exercise of reasonable care and diligence *should* have learned of the presence of the foreign object. (389 P. 2d at 232.)

This landmark case merits such extensive treatment as it is the only Idaho law available on the precise question of the accrual of a cause of action for malpractice. Idaho would not allow lapse of time, standing alone, to bar invocation of the discovery rule. In *Billings v. Sisters of Mercy of Idaho,* supra, the suit was brought some fifteen years following the original allegedly negligent act. The continuance of a doctor-patient relationship was not necessary to invocation of the doctrine. *Billings,* supra, was a case in which that relationship had not existed for fourteen years prior to suit. Prejudice to the defendant doctor, by way of lack of availability of records and memory, would not bar invocation of the doctrine. *Billings,* supra, was a case in which the defendant doctor was dead.

In reaching its conclusion, the Idaho Court in *Billings v. Sisters of Mercy of Idaho,* supra, primarily relied upon two cases: *Seitz v. Jones,* Okla., 370 P. 2d 300 (1962) and *Heysman v. Kirsch,* 6 Cal. 2d 302, 57 P. 2d 908 (1936). Each of these cases adopted a pure discovery rule, each being a case of a foreign object negligently left in the body of the patient. In each case, it was determined that the statute of limitations commenced to run from the date when the

plaintiff discovered, or reasonably *should* have discovered, the negligent act of the defendant doctor.

In this Honorable Court's first appellate opinion in this cause, a series of cases was cited concerning the role of a continuing doctor-patient relationship in invocation of the discovery doctrine. (342 F. 2d at 820.) *Greninger v. Fischer,* 81 C.A. 2d 549, 184 P. 2d 694 posed the discovery rule in the alternative, i.e., that the statute of limitations would not ordinarily start to run until such time as the plaintiff discovered or should have discovered the wrongful act or the termination of the relationship of doctor and patient. It is impossible from the Court's opinion to determine how long a period elapsed between the termination of the relationship and the filing of the complaint. It apparently was less than the one year California statute of limitations. *Costa v. Regents of University of California,* 116 C.A. 2d 445, 254 P. 2d 85 (1953), like *Greninger,* supra, was outside the foreign object field. In this case, the doctor-patient relationship ceased on January 1, 1947 and the action was filed on November 5, 1948, more than one year (the California statutory period) after the termination of the relationship. The case sets forth the standard California discovery rule, i.e., that the statute of limitations does not start to run until the date of discovery, or the date when, by the exercise of reasonable care, the plaintiff *should* have discovered the wrongful injury. Parenthetically, the Court noted that the question of when the plaintiff discovered or should have discovered the wrongful act was one for the jury; the jury's determination in favor of the plaintiff

was sustained by evidence that the plaintiff did not know the origin of his injury until many months after he left the defendant's care. *Costa v. Regents of University of California,* supra, 116 C.A. 2d at 455.

Also cited in the prior appellate opinion in this case (342 F. 2d at 820) as to the crucial role of the continuing doctor-patient relationship was *Myers v. Stevenson,* 125 C.A. 2d 399, 270 P. 2d 885 (1954). In that case, the doctor-patient relationship ceased in May of 1946. The action was filed March 18, 1952, with an alleged date of discovery of July of 1951. The governing statute of limitations, however, was the special one set forth in Section 29 of the California Civil Code, providing for a six year period in cases of injuries during birth. The Court, in applying the usual discovery rule, noted that, so long as the physician-patient relationship continued, the patient is not ordinarily put on notice of negligent conduct of the physician upon whose skill, judgment and advice he continues to rely. *Myers v. Stevenson,* supra, 125 C.A. 2d at 402. It may be seen from this authority that the continuation of the doctor-patient relationship is a factor, *embraced within the discovery rule,* utilized in determining when the plaintiff *should* have discovered the wrongful act. *Hundley v. St. Francis Hospital,* 161 C.A. 2d 800, 327 P. 2d 131 (1958) was also cited (342 F. 2d at 820) as dealing with the continuation of the doctor-patient relationship. In that case, involving an allegedly unnecessary removal of the uterus, an ovary and a fallopian tube, in the face of pathological findings showing no malignancy, the

action was filed February 8, 1952. Evidence showed that the plaintiff had been a patient of the defendant until February 28, 1951, the surgery having taken place on May 25, 1949, and follow-up surgery on August 12, 1949. The Court, in holding that the statute of limitations did not commence to run until the plaintiff learned of the true pathological diagnosis, said,

> "Thus, in the absence of actual discovery of the negligence, the statute did not commence to run during such period . . . and this is true even though the condition itself is known to the plaintiff, so long as its negligent cause and its deleterious effect is not discovered . . . "

The California cases show that continuation or lack thereof of the doctor-patient relationship is but one factor, embraced within the discovery rule itself, utilized in determining the reasonableness of the plaintiff's conduct. The rule is simply that the patient is not expected to question the doctor's judgment during the life of the relationship. Thus, facts which, if brought to the plaintiff's attention after the termination of the relationship, might be held to put the plaintiff on notice, do not produce this result when communicated to the plaintiff while still under the defendant doctor's care. In the case at bar, the evidence was uncontroverted that, insofar as examination, treatment and advice concerning cancer was concerned, plaintiff-appellant relied solely upon Appellee White until she sought out Dr. Shaw in 1962; that itself was solely for the purpose of the type of continued care which Appellee White admittedly had

impressed upon her as being necessary in view of her prior alleged malignancies.

The inherent difficulty of discovering some wrongs, as a factor to be considered in determining whether to invoke the discovery rule, was emphasized in the prior appellate opinion (342 F. 2d at 820), citing *Agnew v. Larson,* 82 C.A. 2d 176, 185 P. 2d 851 (1947). There the Court first considered and rejected the defense assertion that the discovery rule was confined to foreign object cases. *Agnew v. Larson,* supra, 82 C. A. 2d at 181. The Court cited and relied upon *Hahn v. Claybrook,* 130 Md. 179, 100 Atl. 83, for the proposition that the statute began to run only when the plaintiff had sufficient facts to put her on notice and inquiry. Agnew had alleged that the defendant had negligently prescribed certain drugs which caused her to form a cancer in her breast, resulting in surgical removal. The defendant had been employed on January 27, 1942. Mrs. Agnew alleged that she discovered the cancer on February 8, 1945, the breast being removed on February 10, 1945. The complaint was filed on January 15, 1946; the statute of limitations involved was the California one year statute. In sustaining the plaintiff's right to maintain the action, the Court did comment upon the gradual growth of and difficulty of detecting cancer, going on to state:

> ". . . where injury proximately results from the negligent act of the physician and the patient has relied upon him for information as to his physical condition as well as for the results that may reasonably be anticipated from the introduction

into his body of the foreign substance or matter, including drugs and medicines, the statute of limitations does not commence to run until the patient knows, or in the exercise of ordinary care *should have known,* the cause of his injury . . ." (Emphasis supplied.)

*Agnew v. Larson,* supra, 82 C.A. 2d at 182.

In *Agnew v. Larson,* supra, the very nature of cancer, its insidious and gradual growth, obviously made it difficult for plaintiff to discover that she was being injured. In the case at bar, plaintiff-appellant knew instantly that she had lost her breast and certain associated tissues, the radical mastectomy having been performed. Nevertheless, considering that Appellee White told her she had cancer, repeated to her in 1956 that a thyroidectomy was necessary because of her history of cancer, and diligently persuaded her that, having suffered from cancer, she had to live with this fact, she had no reason to question the original diagnosis. Here was an inherently unknowable harm of a different sort. Only a pathologist could re-read the slides for Appellant. Only the move to California could and did require that she come under the care of a new physician with specialized knowledge in the field of cancer. Only that event triggered a reexamination of these slides, bringing home to her for the first time the fact that she had never, despite surgery, radiation, the thyroidectomy and the soothing supportive care, suffered from cancer. The harm here was as inherently unknowable, if not more so than, that in *Agnew v. Larson,* supra.

In *Seitz v. Jones,* supra, cited and relied upon in *Billings v. Sister of Mercy of Idaho,* supra, several of the California cases were collected and relied upon. Since *Seitz v. Jones,* supra, was a foreign object case, the emphasis was, naturally, upon cases involving like circumstances. *Ehlen v. Burrows,* 51 C.A. 2d 141, 124 P.2d 82 (1942), was a case where the defendant doctor left decayed and broken roots of teeth in the plaintiff's jaw. This was clearly a transitional case, holding that the statute of limitations started to run from the severance of the doctor-patient relationship, in a case alleging negligent care. It is interesting to note that the opinion reflects a complaint with no allegation as to when the existence of the broken roots was discovered. In the absence of such an allegation of discovery, the Court held that the statute of limitations had run, barring plaintiff's claim as to negligent care. However, emphasizing the continuing relationship, the alleged incompleteness of the treatment, with the roots left in, the Court held that as to the broken roots remaining in the plaintiff's jaw, the statute of limitations did not commence to run until the plaintiff discovered or *should* have discovered the harm.

*Pellett v. Sonotone Corporation,* 55 C.A. 2d 158, 130 P. 2d 181 (1942) is a foreign object case remarkable chiefly for the fact that the foreign object was a portion of a plaster mold left in plaintiff's ear after a fitting for a hearing aid. The Court announced the standard discovery rule, i.e., that the statute of limitations started to run when the plaintiff discovered,

or in the exercise of reasonable diligence, should have discovered the presence of the foreign object. The mold had been made on March 22, 1939; plaintiff learned of the plaster's presence on February 5, 1940 and the action was filed on May 10, 1940. There was no issue as to continuing care, as there had never been a doctor-patient relationship.

*Bowman v. McPheeters,* 77 C.A. 2d 795, 176 P. 2d 745 (1943), cited and relied upon in *Seitz v. Jones,* supra, is also a transitional case. Here, the "fraudulent concealment" doctrine, which was explicitly rejected in *Billings v. Sisters of Mercy of Idaho,* supra, was considered and, at least partially, relied upon. While a discovery rule was applied, this was explicitly as an adjunct to the fraud theory. The doctor-patient relationship was considered only in relation to the question of when the plaintiff discovered or should have discovered the "fraudulent concealment". Plaintiff had engaged the defendant on August 6, 1941. The defendant assured the plaintiff that his arm was all right, despite plaintiff's later allegations that x-rays had caused a cancerous growth in the tissues of his arm. Consultation with the defendant continued until November of 1943. In December of the same year, plaintiff consulted other doctors who informed him of the cancerous condition. The Court specifically noted that, before plaintiff might be chargeable with want of diligence in failing to sooner discover the truth, he must be under a duty to make discovery.

> ". . . where no duty is imposed by law to make inquiry, and where under the circumstances 'a prudent man' would not be put upon inquiry, the

> mere fact that means of knowledge are open and not availed of does not operate to give constructive notice of the facts . . ."
>
> *Bowman v. McPheeters,* supra, 77 C.A.2d at 798.

Even though the continuing relationship was emphasized in *Bowman v. McPheeters,* supra, as affecting discovery under a "fraudulent concealment" rule, the language and rationale of the decision is significant. The Court there recognized that, in the nature of the doctor-patient relationship, so long as the patient continues to look to the doctor for advice, care and treatment, facts, the possession of which might ordinarily put the plaintiff on notice, do not operate to do so. The next logical and inescapable step is that, even though the doctor-patient relationship may gradually come to an end, unless it ends on a note of dissatisfaction or with the possession of some facts which cry aloud the negligence of the doctor, the patient can scarcely be expected to commence his relationship with the next doctor by asking for an investigation of possible negligence on the part of the first doctor.

The opinions in *Billings v. Sisters of Mercy of Idaho,* supra, *Seitz v. Jones,* supra, and the first appellate opinion in this case all cited and relied upon California cases. There are many California cases on point decided later than those referred to. For instance, there are several explaining the importance of the continuation of the doctor-patient relationship. In *Stafford v. Shultz,* 42 Cal. 2d 767, 270 P. 2d 1 (1954),

treatment had commenced on March 6, 1949. It culminated in the amputation of the plaintiff's left leg on September 22, 1949, plaintiff having been informed of the necessity for this amputation on September 2, 1949. On August 2, 1950, the plaintiff received medical reports which had previously been filed with the State Industrial Accident Commission. It was the possession of these reports which led him to the investigation which resulted in suit. The Court applied the usual discovery rule, i.e., that the statute of limitations did not commence to run until the plaintiff had discovered his injuries or, in the exercise of reasonable diligence, *should* have discovered it. Further, the Court specifically noted that, because of the continguing fiduciary relationship between the doctor and the patient, facts which would ordinarily excite suspicion or require investigation did not do so and the same degree of diligence was not required of the plaintiff. Therefore, even though the plaintiff had been told his leg would have to be amputated, he was not put on notice that the cause of this was the defendant's negligence. Neither did the filing of the medical reports with the Industrial Accident Commission, possibly conferring "constructive notice" have this effect. *Stafford v. Shultz,* supra, 42 Cal. 2d at 777, 778 and 782.

*Gærlock v. Cole,* 199 C.A. 2d 11, 18 Cal. Rptr. 393 (1962) was an appeal from summary judgment. Allegedly, a drug injection undertaken on November 27, 1957, resulted in a permanent deformity. Defendant doctors thereafter represented to plaintiff that

the arm would be all right in a year. The plaintiff returned in a year as directed and was then told that the injury was permanent, but that a "settlement" would be made. In July of 1959, plaintiff learned for the first time from defendants that they intended no settlement. The complaint was filed on August 20, 1959, being governed by a one year statute of limitations. The Court held that the statute had not started to run until the plaintiff discovered that his injury was due to the defendants' wrongful act or reasonably should have discovered this:

> "actual or constructive notice not only of the condition but of its negligent cause and deleterious effect is implicit in this definition . . ."
>
> *Garlock v. Cole,* supra, 199 C.A. 2d at 15.

In the later California cases, the continuation of the doctor-patient relationship is important only insofar as it determines the reasonableness of the plaintiff's conduct. That is, within the context of the discovery rule, the relationship blunts the impact of facts known and prevents knowledge of them from setting the statute running when, in the absence of the relationship, such knowledge would do so.

A series of California cases, applying the discovery rule, in which it was held that the statute had run, is instructive. These cases illustrate the nature and quality of those facts, knowledge of which is sufficient to constitute "discovery". As the Idaho Court in *Billings v. Sisters of Mercy of Idaho,* supra, adopted the discovery rule based largely on California precedent, it is most likely that it would shape and define

this rule in the same fashion, with the same reasoning, as the California precedents.

In cases of negligent misdiagnosis, such as the one at bar, the statute is held to have commenced running when the patient was informed that the original diagnosis was in error. In *Hemmingway v. Waxler,* 128 C.A. 2d 68, 274 P. 2d 699 (1954), the plaintiff's leg was broken in a motorcycle accident on December 31, 1950. X-rays were taken, but the defendant doctors told the plaintiff there was no fracture and that he could put weight on the leg. At some time between January 8 and January 12, 1951, the plaintiff was told by other doctors that his leg was fractured. Suit filed on May 16, 1952, was too late. Once plaintiff was informed that the original diagnosis was in error, the exercise of reasonable diligence required that he now make further inquiry to ascertain the effects of this erroneous diagnosis. *Hemmingway v. Waxler,* supra, 128 C.A. 2d at 71.

In *Mock v. Santa Monica Hospital,* 187 C.A. 2d 57, 9 Cal. Rptr. 555 (1960) surgery was performed on the plaintiff on June 15, 1954. On January 24, 1956, plaintiff was informed, via medical reports, that her present condition was due to the surgery and not to the injury which the surgery had been designed to repair. It was held that the statute of limitations began to run from this date. When the plaintiff had notice or information of circumstances which would put her on inquiry which inquiry, if followed, would lead to knowledge, then the facts were presumptively within her knowledge and her cause of action then

accrued. *Mock v. Santa Monica Hospital,* supra, 187 C.A. 2d at 66.

Another case of misdiagnosis was involved in *DeVault v. Logan,* 223 C.A. 2d 802, 36 Cal. Rptr. 145 (1963). Plaintiff was injured in a fall on February 25, 1960. Defendant told her that she had no fracture and could get around with the use of crutches. On February 26, 1960, she heard a "pop", experienced pain and fainted. Nevertheless, she took no action, although informed there was in fact a fracture, until she heard a chance remark from an attorney that she might have a claim. This occurred in March of 1961 and suit was filed July 26, 1961. Once plaintiff knew the original diagnosis was in error, the statute began to run. Her claim was barred. *DeVault v. Logan,* supra, 223 C.A. 2d at 809.

*Weinstock v. Eissler,* 224 C.A. 2d 212, 36 Cal. Rptr. 537 (1964) is remarkable chiefly for its recognition that the actual or constructive discovery must be of the *negligence* of the defendant. Plaintiff, not having pleaded the circumstances under which discovery was made or any fact from which it could be concluded that she should not have made earlier discovery, was barred.

*Tell v. Taylor,* 191 C.A. 2d 266, 12 Cal. Rptr. 648 (1961) was a negligent misdiagnosis case in which the statute of limitations was raised by motion for summary judgment. Plaintiff fell and injured her hip on June 22, 1957. Between that date and July she saw and was treated by defendant on seven occasions. On the 15th of July, an orthopedic surgeon took x-rays

which revealed a fracture and corrective surgery was thereafter performed. Suit was not brought until January 22, 1959. Summary judgment for defendant was affirmed, the Court holding that the statute started to run when the plaintiff acquired full knowledge of the defendant's negligent misdiagnosis on July 15, 1957. *Tell v. Taylor,* supra, 191 C.A. 2d at 271.

The California cases establish the abstract language of the discovery rule, i.e., that the statute starts to run from and the cause of action accrues on the date when the plaintiff actually discovered, or, in the exercise of reasonable diligence should have discovered the negligent injury. In applying the abstract rule to concrete facts, more specifically in the misdiagnosis cases, it is knowledge of the error in the original diagnosis which causes accrual of the cause of action. In this case, no slightest hint of the error in the original pathological diagnosis was received by Appellant until September of 1962. Her complaint was filed well within two years following that date. Applying the discovery rule, her cause of action could have accrued no earlier than September of 1962 and her suit was timely.

The discovery rule has been adopted in many states other than California. In *City of Miami v. Brooks,* Fla., 70 So. 2d 306 (1954) the Court cited and relied upon *Urie v. Thompson,* 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, a much cited case arising under the Federal Employers Liability Act. The statute was held to run from the date when plaintiff had notice of the defendant's negligence:

> ". . . in other words, the statute attaches when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action . . ."
>
> *City of Miami v. Brooks,* supra, 70 So. 2d at 309.

Louisiana adopted the discovery rule in *Perrin v. Rodriguez,* 153 So. 555 (1934), holding that the prescriptive period did not start to run until the plaintiff discovered that he had sustained injury and that it had resulted from the negligence of the defendant. The same rule was applied in *Thomas v. Lobrano,* La., 76 So. 2d 599 (1954). Two Louisiana cases in which the statute was held to have run are instructive. In *Phelps v. Donaldson,* 243 La. 1118, 150 So. 2d 35 (1963) the plaintiff had, beyond the prescriptive period, become markedly dissatisfied with the defendant's treatment and suspicious of his methods. In *Springer v. Aetna Casualty and Surety Company,* La., 169 So. 2d 171 (1964), a negligent misdiagnosis was the foundation of the law suit. Plaintiff's discovery of the diagnostic error having been beyond the prescriptive period, suit was barred.

Texas has adopted the discovery rule. *Allison v. Blewett,* Tex., 348 S.W. 2d 182 (1961). It was held that plaintiff could rely upon the original statements and diagnosis of defendant doctor until such time as she came into possession of such facts or knowledge as would put an ordinarily prudent person upon inquiry as to their correctness. Once plaintiff was put on notice, the statute of limitations would begin to run. *Allison v. Blewett,* supra, 348 S.W. 2d at 184.

North Carolina, in *Nowell v. Hamilton,* 249 N.C. 523, 107 S.E. 2d 112, was faced with the case of an alleged negligent misreading of x-rays. This misreading had caused plaintiff to submit to needless surgery. Plaintiff advanced a "fraudulent representation" theory, i.e., that the representation as to what the x-rays showed was fraudulent and that the statute of limitations governing fraud cases was applicable. The Court rejected this, adopting the discovery theory. With a three year statute of limitations, the discovery by plaintiff of the error in the reading of the x-rays having come more than three years prior to suit, her law suit was barred.

In *Ayers v. Morgan,* 397 Pa. 282, 154 A. 2d 788 (1959) a case of a surgical sponge left in the patient's body, Pennsylvania appears to have possibly adopted the discovery rule. The majority opinion speaks in terms of continuing negligence, i.e., that there was a continuing negligent breach of the duty to remove the sponge. This negligence continued until the date when the plaintiff learned or should have learned of the presence of this foreign object. The concurring opinion speaks in terms of the pure discovery rule. In *Shaffer v. Larzelere,* 410 Pa. 402, 189 A. 2d 267 (1963) plaintiff, following dismissal, had been denied leave to amend to plead that the negligence was not discovered and could not, in the exercise of reasonable diligence, have been discovered until within the prescriptive period, the defendants having deliberately concealed the facts. The Court held that the amendment should have been allowed. While the proposed amendment spoke in terms of deliberate concealment,

the Court speaks in terms of the statute running only from the date when the complaining party knows, or should have known, of the injury. *Shaffer v. Larzelere,* supra, 189 A. 2d at 270.

New Jersey set forth the standard discovery rule in a foreign object case in *Fernandi v. Strully,* 35 N.J. 434, 173 A. 2d 277 (1961). Significantly, chief reliance was placed upon *Urie v. Thompson,* supra, and the California Court's decision in *Heysman v. Kirsch,* supra.

The Michigan Court, in *Johnson v. Caldwell,* 371 Mich. 368, 123 N.W. 2d 785 (1963) cited and relied upon the California decision in *Greninger v. Fischer,* supra. This is a case of negligent misdiagnosis and plaintiff was not informed of the error in diagnosis until she was hospitalized approximately two years later for an unrelated condition. Suit was filed one year after she was informed of the error in diagnosis and, with a two year statute of limitations, suit was timely. Once more, it was the knowledge of the error in the diagnosis, placing plaintiff upon notice that her condition was the result of the defendant's negligence, which commenced the running of the statutory period.

*Spath v. Morrow,* 174 Neb. 38, 115 N.W. 2d 581 (1962) was a foreign object case, involving a broken needle left in the patient at the time of suturing following childbirth. With a two year statute of limitations, the plaintiff was informed of the presence of the needle on June 13, 1960 and commenced her action on May 29, 1961. The needle had been embedded in her on July 10, 1951, nearly ten years prior. Holding

that the cause of action did not accrue until the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the presence of the foreign object, the Court also set forth the philosophy underlying this discovery rule. First, there is a presumption that one having a well-founded claim will not delay in enforcement thereof, but the basis of this presumption is gone when the plaintiff, through ignorance, cannot resort to the Courts. One of the salutary features of the discovery rule is that, since patients should not be encouraged to go from physician to physician in an effort to ascertain whether diagnosis or treatment was proper, the discovery rule requires the plaintiff to act with due diligence based only upon those facts which come to him. *Spath v. Morrow,* supra, 115 N.W. 2d at 584.

A Nebraska Court also has had occasion to deal with a misdiagnosis problem in a case where it was determined that the statute of limitations had run. In *Stacey v. Pantano,* 117 Neb. 694, 131 N.W. 2d 163 (1964), part of the plaintiff's thyroid was removed on June 26, 1959. A condition of faulty calcium metabolism ensued. The defendant assured plaintiff that this was due to her mental or psychological state. On April 6, 1960, the plaintiff consulted another physician and was informed of the error in defendant's diagnosis. The action was brought August 16, 1962, with a two year statute of limitations. The Court rejected the plaintiff's contention that the case was governed by a four year statute of limitations applicable to fraud actions and held that the cause of action accrued on April 6, 1960, when the plaintiff was in-

formed of the error in defendant's diagnosis. Once more, in a misdiagnosis case, similar to that at bar, "discovery" occurs, the cause of action accrues, and the statute of limitations begins to run, when the plaintiff first learns that the original diagnosis was in error. In our case, that date would be September of 1962.

The Federal Courts, in administering the Federal Tort Claims Act, have applied the standard discovery rule to medical malpractice actions. *Quinton v. United States,* 304 F. 2d 234, 5th Cir., 1962; *Hungerford v. United States,* 307 F. 2d 99, 9th Cir. 1962.

In sum, then, the Courts adopting the discovery rule have, whether dealing with foreign object cases or those outside that field, held that the cause of action accrues and the statutory period commences to run only from such time as when the plaintiff actually discovers or, in the exercise of reasonable diligence *should* have discovered the defendant's negligence. Factors such as the continuing relationship of doctor and patient, the difficulty in ascertaining certain wrongs, have been utilized in determining whether, *within the discovery rule,* the plaintiff has exercised due diligence. Appellant's research has uncovered no case, decided by a Court committed to the discovery rule, in which these factors have been utilized to determine whether the discovery rule should be applied. The discovery rule has always been applied, but these factors are a portion of that rule.

In the misdiagnosis cases, it appears uniformly to be held that it is knowledge of the error in the original diagnosis which sets the statute running.

Here, this could be no earlier than September of 1962; Appellant's complaint was filed well within the prescriptive period.

Based upon the above, it is very respectfully submitted that the Trial Court, in applying a standard of when Appellant *could* rather than *should* have discovered the error in diagnosis, erred. Further, there being no contention, no evidence, no claim that Appellant had any notice of the fact that she had not suffered from cancer until September of 1962, her cause of action could have accrued no earlier than that date. As pointed out above, Idaho law makes the statute of limitations in the comparable situation involving discovery of fraud an affirmative defense, as to which the defendant must carry the burden of proof. *Pauley v. Salmon River Lumber Company,* supra. Federal Courts, dealing with motions for summary judgment based upon the statute of limitations where a discovery rule was involved have held that there must neither be a dispute as to the facts nor as to the inferences to be drawn from the facts. See, e.g., *R. J. Reynolds Tobacco Company v. Hudson,* supra, citing and relying upon the Louisiana discovery rule set forth in *Perrin v. Rodriguez,* supra. Cf. *Tracerlab, Inc. v. Industrial Nucleonics Corporation,* supra and *Sheets v. Burman,* supra.

Even if the above analysis be incorrect, it is respectfully submitted that the Trial Court erred in applying the standards set forth in the prior appellate opinion in this case. It was clear from the evidence that Appellant continued to rely upon Appellee White as her medical adviser in the field of cancer up to and in-

cluding a time well within the statutory period. The parties stipulated that all medical reports, records, summaries, etc. dealing with this case were still available. Appellee McCarter testified that the tissue section slides were still readable, i.e., he had made a diagnosis from them only a matter of weeks prior to the hearing. It appeared that only one pathologist who had been practicing in the community at the time of Appellant's surgery was no longer available. It is respectfully submitted that this does not show the degree of prejudice to Appellees which could possibly outweigh the policy in favor of giving Appellant her day in Court.

Section 5-230, Idaho Code, provides that a married woman is under a disability to bring a suit during the period of her marriage. Appellant was married at the time of the events upon which this litigation is founded. She continued in her marital state until August of 1959. Section 5-229 provides that the statute of limitations is tolled during the absence of a defendant from the state. Appellee White was absent from the state from September of 1961 on. Thus, Appellant's claim, regardless of the applicability of the "discovery rule", could not have accrued prior to August of 1959. Appellee White's absence from the State tolled the statute of limitations. No evidence was adduced bearing upon the question of whether, considering Appellant's marital status and the absence of Appellee White from the State, an Idaho Court would have determined the filing of the complaint to be timely. Thus, this question is pre-

sented only upon the pleadings and there is a triable issue of fact. Appellant has devoted comparatively little space in this brief to this question solely because it is clear, under the authorities cited above, that the discovery rule operated to delay the accrual of her cause of action until August of 1962.

One possible further issue remains: Although evidence was not offered on the precise point and there appears to have been no argument devoted thereto at trial, it might be argued that the fact that there was no cancerous tissue revealed in the matter stripped away during the radical mastectomy might have placed Appellant on notice that the original diagnosis was in error. The work, *"Cancer: Diagnosis, Treatment and Prognosis"* by Lauren V. Ackerman, M.D. and Juan A. del Regato, M. D., a standard reference work, illustrates the fallacy of any such argument. In this work, it is indicated that, when a biopsy reveals the presence of a malignancy, the only justifiable procedure thereafter is a radical mastectomy. Ibid., pp. 1006 and 1007. Therefore, the radical mastectomy would be required, given malignancy found in the biopsy, whether the radical mastectomy turned up further cancerous tissue or not.

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## CONCLUSION

It is very respectfully submitted that the District Court erred in the following particulars:

(1) The District Court failed to apply the applicable Idaho rules of law, more particularly those

making the statute of limitations an affirmative defense.

(2) The District Court granted summary judgment despite the presence of disputed issues of fact and of disputed inferences to be drawn from those facts which were not in dispute.

(3) The District Court erred in its conception of the discovery rule, failing to apply the well settled rule that, in a misdiagnosis case, the cause of action accrues only when the patient knows of the error in the original diagnosis.

(4) The District Court erred when, with all medical records available, all of the witnesses alive and able to testify, the tissue slide section available for reading, it found that the prejudice to Appellees outweighed Appellant's right to have her day in Court. For these reasons, it is very respectfully submitted that the judgment rendered below should be reversed and the cause remanded with directions that Appellant be allowed to proceed to trial.

Dated, San Francisco, California,
April 6, 1966.

Respectfully submitted,
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## Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frederick A. Cone.